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Between (Re-)Empowerment and (Hyper-)Conditionality

The Rise of Accountability-Driven Governance in Development Cooperation

FLORIAN HOFFMANN — 17 July, 2018



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Credits: Aleksandar Pasaric

Ever since David Trubek and Mark Galanter's seminal 'Scholars in Self-Estrangement', which Philip Dann, during the seminar that gave rise to this post, aptly termed the 'law and development movement's defining moment', there has been intense self-reflection by scholars on

the role of law in and for 'development' and about the analytical and normative currency of this approach. And in line with the broader 'turn to history' in law, this self-reflection has centred on the question of periodization of 'law and development' thinking, with (again) David Trubek and Alvaro Santos' 2006 collection on *The New Law and Economic Development: A Critical Appraisal* being, perhaps, the most influential contribution. They identify three successive moments in 'law and development', notably a first one in which law is seen as a tool for development wielded by states operating, broadly, within a (domestic) welfare paradigm; a second moment in which law is refashioned into an instrument to contain state intervention and to ring-fence liberalized and transnationalized markets which now assume the primary role as drivers of development; and a third, still ongoing moment in which the state returns to a proactive, if fundamentally changed role in development as a guarantor of a certain type of rule of law, notably one that is meant to enable the frontline actors of development – individuals, communities, but also corporations – to shape their development within a globalized market economy in which states continue to form the primary framework of action.

A Not so Distant Mirror: the study of 'law and/in development' and the transformation of modern statehood

This third moment is, hence, premised both on the re-emergence of the state but also, and paradoxically, on its profound transformation. In its present incarnation, it is often referred to as the 'regulatory state' (in the global North) or as the 'new developmental state' (in the global South) and it differs from its earlier, post-War self in that its main role is today deemed to be as a guarantor of the functionality of (increasingly global) markets and as an absorber of intermittent market failures. As a consequence, it is markets, and not the state, that generate an ever larger portion of the raw materials for social welfare and economic development, with the state merely providing necessary if limited regulatory and arbitral authority. Hence, notwithstanding its constitutional and international (legal) obligations, the contemporary state operates in a much reduced policy space that structurally curtails its capacity to directly attend to the demands brought to it by its

constituents, including in the area of social and economic policy.

This is, in turn, exacerbated by a second transformation that affects the state's ability to bear its (legal) obligations, notably the fact that, increasingly, the policy issues faced by the state, as well as their solutions, lie outside of its jurisdictional and fiscal remit. The reason for this lies in the series of internationalization and transnationalization processes commonly subsumed under the label of globalization, a process which has transformed individual states from the sovereign monads of Vattelian international law into nodes within overlapping normative networks. As a consequence, many of the state's fundamental tasks can only be fulfilled collectively, in conjunction with other states, intermediated by international organizations or, indeed, alongside different types of non-state actors such as corporations or civil society organizations (CSOs).

However, the ongoing transformation of the state from direct provider to regulator of public service provision within the paradigm of post-welfarist regulatory statehood changes only the nature but not the scope of its legal responsibility. This continuing state-centrism on the demand side is, however, increasingly unmatchable by the state's capacity to supply public service levels in accordance with international minimum standards either through its direct financial intervention or through its (market) regulatory authority. The current phase of global finance capitalism has significantly reduced the fiscal and, therefore, the policy space in both developed and developing states, generating a mismatch between the demand for responsibility placed on the state by the logic of sovereignty and articulated through international law, and its factual capacity to supply this normative demand with material substance.

It is these developments that have, then, brought about the ascendancy of (a certain type of) rule of law as the main contemporary mode of (good) governance. For, as ever more aspects of national and international political life have become legalized, judicial bodies have (been) turned into core instruments in the domestic and international policy process meant to enforce the principles underlying the idea of good governance, such as, transparency, participation, human rights, and legal and administrative due process –all to be subsumed under

the general label of accountability – against potentially recalcitrant domestic executives and legislatures. The, arguably, central format through which this new logic has been expressed has been human rights, or, more precisely, rights-based forms of (legal) accountability ranging from constitutionally-entrenched bills of rights to the rights based development paradigm that now dominates at least the rhetoric of multilateral development institutions.

However, and paradoxically, this empowerment of law and legal institutions – most notably courts – has also significantly tightened the legal constraints placed on governments, such as in relation to fiscal policy, and it has, thus, raised, rather than decreased, the threshold for the fulfilment of constitutional or international legal obligations. Moreover, it has also produced a growing legitimacy crisis as judiciaries and legal experts often get the final say over policy while themselves being epistemically constrained by the particular legal horizon within which they operate.

Towards the Panoptikon: the ‘Turn to Accountability’ in Development Governance

The backdrop to this paradox is, of course, the continuing suspicion that (state) politics, and especially democratic politics, remains the monster to be contained, now alongside the white-knight-turned-dragon of the market. Hence, in the ‘new developmentalism’ of this third moment, law, too, is transformed from the comparatively crude sword of direct state intervention to a much more subtle set of normative precepts which produce an epistemic space in which all those within it are firmly locked into a continuous cycle of self-observation, self-discipline, and self-improvement. This new ‘audit culture’, coupled with the corporatization of the state and the rise of ‘expertocracy’, represents a transformation of the meaning and source of organizational legitimacy, of the nature of knowledge production, and of the ‘private life’ of the law (in development). Indeed, this law needs to be ‘hard’ only on the margins, to delimit its authority and to keep unruly politics at bay, so as to (arguably) mystify the political origins of its ‘soft’ normative core. That core is articulated in the language of (meta-normative) governance principles, such as the well-metaphored PANTHER (‘participation, accountability,

non-discrimination, transparency, human dignity, empowerment, and rule of law') set or the AAAAQ ('availability, accessibility, acceptability, adaptability, and quality') rules for (self-)assessing policy.

These (meta-)norms are, in their own self-description, strictly procedural, impersonal and politically neutral and, substantially, purport to re-construct their framework of reference from the state to the humans living in them. These (humans) are addressed in a range of vocabularies, from the capabilities approach to rights-based development, the stated objective of which are a devolution (of sorts) of development agency to its 'lowest-level' stakeholders. However, this requires at once strict control of the 'providers' of (development) services – including and especially state-level agencies and actors – as well as the mentioned epistemic framing of stakeholders themselves, so that these use their agency in the right, i.e. market-compatible way. Both requirements are addressed by accountability in its various guises, i.e. as classical institutional accountability or as 'bottom-up' social accountability. All aspects of development planning and implementation are, thus, geared towards accountability procedures which form a complex managerial system characterized by self-referentiality and self-legitimation. While its singular meta-objective, poverty-reduction, forms this system's cognitive horizon – and self-description –, its de facto functionality is geared towards the production of an (input) legitimacy that is largely autonomous of actual outcomes and primarily serves the self-reproduction of the (meta-)normative regime at its base.

Accountability(-Driven Governance) as Empowerment or Conditionality?

Hence, on the face of it, accountability-driven governance would appear to represent but a new guise for old conditionalities, accentuating rather than diminishing the (pre-)existing asymmetries between donors and recipients by placing primary responsibility on developmental states whose fiscal and legal autonomy have been starkly reduced in the global economy. However, given the inherent indeterminacy of many of the normative frameworks at the base of accountability-driven governance, not least human rights, the 'turn to accountability' can also be seen as at least providing new gateways for

a re-balancing of development policy (making) towards stakeholders ‘on the ground’ and for re-distributing development agency ‘downwards’ by creating transparent feedback links between recipients and donors. This may make development cooperation both more efficient and more legitimate, and it may provide an instrument for genuine empowerment. However, only if ‘bottom-up’ social accountability within, for instance, rights-based development frameworks, is actually built into programming and endowed with real institutional teeth will it actually enable a paradigm change ‘from below’ and beyond established path dependencies.

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